



July 9, 2001

Mr. George D. Cato
Deputy General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-2927

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149184.

The Texas Department of Health (the "department") received a request for information relating to Memorial Herman Northwest Hospital, a general hospital licensed by the department. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You acknowledge that the department failed to comply with section 552.301(b) and (d) of the Government Code in asking for this decision. Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. You argue that the submitted information is excepted under section 552.101 of the Government Code. Section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You argue that section 241.051 of the Health and Safety Code prohibits the release of some of the submitted documents. Chapter 241 of the Health and Safety Code governs licensing of hospitals. Section 241.051 authorizes the department to make any inspection, survey, or investigation that it considers necessary, and provides in pertinent part:

(d) All information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital are confidential and not subject to disclosure under Section 552.001 et seq., Government Code, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the department or its employees or agents involved in the enforcement action except that this information may be disclosed to:

- (1) persons involved with the department in the enforcement action against the hospital;
- (2) the hospital that is the subject of the enforcement action, or the hospital's authorized representative;
- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying and hospital-identifying information has been deleted.

(e) The following information is subject to disclosure in accordance with Section 552.001 et seq., Government Code:

- (1) a notice of alleged violation against the hospital, which notice shall include the provisions of law which the hospital is alleged to have violated, and a general statement of the nature of the alleged violation;
- (2) the pleadings in the administrative proceeding; and
- (3) a final decision or order by the department.

You indicate that the department obtained and compiled some of the submitted information as a result of an investigation concerning a general hospital. See Health & Safety Code § 241.003(5) (defining general hospital). You also state that the submitted information does not contain any information that falls within the exceptions to confidentiality outlined in section 241.051 of the Health and Safety Code. After reviewing the submitted information, we agree that some of the submitted documents are confidential pursuant to section 241.051 of the Health and Safety Code in conjunction with section 552.101 of the Government Code. We have marked the information that is confidential under section 241.051.

You also indicate, however, that some of the submitted documents are confidential pursuant to chapter 48 of the Human Resources Code. Chapter 48 of the Human Resources Code governs investigations and protective services for elderly and disabled persons. Section 48.101 reads in part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under ... chapter [48 of the Human Resources Code];
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

Therefore, the "Abuse/Neglect/Exploitation Investigation" form included in the submitted information must not be released to the public, except for a purpose consistent with chapter 48 of the Human Resources Code or as provided by a department or investigating state agency rule or federal law. *See id.* § 48.101(b). *But see* 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances); 25 T.A.C. § 1.207. We have marked the information that is confidential under section 48.101.

Finally, you contend that one of the submitted documents, a statement of deficiencies, is confidential under section 1306(e), title 42 of the United States Code and section 401.133(a)(2), title 42 of the Code of Federal Regulations. Section 1306 of title 42 of the United States Code requires state agencies operating programs under the relevant subchapter to release certain reports and evaluations, but only after the entity whose performance is being evaluated has had a reasonable opportunity, not exceeding sixty days, to review the report and offer comments. 42 U.S.C. 1306(e), (f). Section 401.133(a)(2) of title 42 of the Code of Federal Regulations provides that a statement of deficiencies or report must be made available to the public "within 90 days following the completion of the survey by the State agency, but not to exceed 30 days following the receipt of the report by [the Health Care Finance Administration]." You indicate that the submitted deficiency report, HCFA Form 2567, is subject to section 1306(e)(3) and (f) of title 42 of the United States Code and section 401.133(a)(2) of title 42 of the Code of Federal Regulations. Therefore, you must release the submitted deficiency report as required by those provisions. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. § 401.133(a)(2).

In summary, you must withhold some of the submitted information under section 241.051 of the Health and Safety Code in conjunction with section 552.101 of the Government Code. Furthermore, you must withhold the submitted "Abuse/Neglect/Exploitation Investigation" form under section 48.101 of the Human Resources Code unless otherwise authorized to release the document under that section. Finally, you must release the submitted deficiency report, HCFA Form 2567, to the extent required by section 1306(e)(3) and (f) of title 42 of the United States Code and Section 401.133(a)(2) of title 42 of the Code of Federal Regulations.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

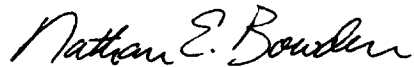
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Nathan E. Bowden".

Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 149184

Enc: Submitted documents

c: Ms. Janice D. Loocke
P.O. Box 131962
Houston, Texas 77219
(w/o enclosures)